IN THE

Supreme Court of the United States

ADOLPHUS F. McCLAINE,
Plaintiff in Error,

vs.

GEORGE C. RANKIN, Receiver of the First National Bank of South Bend, Washington,
Defendant in Error.

No. 88,
October Term,
1903.
(13,772.)

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

Brief of Defendant in Error.

F. F. OLDHAM,
Attorney for Defendant in Error.

IN THE

Supreme Court of the United States.

ADOLPHUS F. McCLAINE,
Plaintiff in Error,
vs.
GEORGE C. RANKIN, Receiver of the First National Bank of South Bend, Washington,
Defendant in Error.

No. 58,
OCTOBER TERM,
1904.
(18,972.)

STATEMENT.

This action was brought by the receiver of the First National Bank of South Bend, Washington, against Adolphus F. McClaine, a stockholder in said bank, for the recovery of the proportionate amount due on his stock of an assessment levied by the Comptroller of the Currency on the capital stock of said bank. The bank suspended business August 10, 1895, and the assessment was made payable on or before September 17, 1896. This suit was commenced in the Circuit Court of the United States for the Western Division of the District of Washington on August 15, 1899, more than two years and less than three years after the date when the assessment became due. A demurrer to the complaint was sustained by the Circuit Court on the ground "that the action was not commenced within the time limited by law." The plaintiff having declined to plead further, final judgment was entered dismissing the action. This

judgment was reversed by the Circuit Court of Appeals for the 9th Circuit, and the cause remanded to the Circuit Court for further proceedings. (106 Fed., 791.)

After a second demurrer to the complaint by defendant was overruled, he filed an answer denying many allegations of the petition and pleading two affirmative defenses.

The first affirmative defense alleges that, on December 30, 1897, the receiver of the First National Bank of South Bend began an action against the defendant in the Superior Court of the State of Washington for Pierce County based entirely upon the same cause of action. On the same date plaintiff obtained judgment upon default which was afterward set aside by the court. Thereafter, March 10, 1898, plaintiff dismissed the action "without prejudice at plaintiff's cost." Thereafter, on April 25, 1898, on application of the defendant, a journal entry was made striking out the words "without prejudice," the journal entry reciting that plaintiff consented "that the words 'without prejudice' in said dismissal might be stricken out."

The second affirmative defense, which also contained a number of counter-claims, all of which were stricken out by the Circuit Court, alleges that the receiver on or about April 5, 1897, instituted another suit in the same State Court against defendant to recover the assessment; that about April 8, 1897, in consideration of the immediate dismissal of the action, defendant conveyed to the receiver certain real estate at South Bend at an agreed price of $415.83, of which $215.83 was to be applied in payment of a claim held by the receiver against one J. W. Morgan, and the balance, $200.00, was to be credited upon the assessment; that on December 30, 1897, in disregard of his agreement to dismiss the action, the receiver obtained a judgment by default against the defendant, which was afterward set aside by the court; that thereafter the defendant made an effort to com-

promise the balance of the assessment in excess of the amount credited thereon, and the receiver accepted the sum of $200.00 in gold to be held in trust for this defendant until said further proposal should be confirmed and ratified by the Comptroller of the Currency. It is alleged that the Comptroller of the Currency never ratified or confirmed the proposition of defendant to compromise the balance of the assessment due from him.

The cause was tried by the court, a jury having been waived, and finding of facts was entered with conclusions of law, and judgment was rendered for the amount of the assessment, with interest from the date it was payable, less a credit of $200.00, amount deposited. The court offered to credit $200.00 on account of the conveyance of land, but defendant having declined to say whether he would accept the credit or not, it was not given. (Record, page 21.)

This judgment was affirmed by the United States Circuit Court of Appeals.

ARGUMENT.

The Statute of Limitations.

It is contended by the plaintiff in error that the cause of action is barred by the Statute of Limitations. It is conceded by the defendant in error that the statutes of the State of Washington are applicable. The statutes of Washington contain no provisions in reference to a liability created solely by statute "except for a forfeiture or penalty." Plaintiff in error contends that so far as the Statute of Limitations is concerned, the action is one arising out of a statute, and there being no express provision of the statute relative to such actions, it comes under Sec. 4805 of Ballinger's Code of Washington, as follows:

> "An action for relief not hereinafter provided for shall be commenced within two years after the cause of action shall have accrued."

The defendant in error relies on the provision in the statutes of the State of Washington, which requires that "an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument," shall be brought within three years.

(Ballinger's Code of Washington, Sec. 4800.)

The contention of defendant in error was fully sustained by the United States Circuit Court of Appeals in this cause, reported under the title of Aldrich *vs.* McClaine, 106 Fed. Rep. 791.

The Court says, after a full citation of authorities, "The liability of the defendant in error as a stockholder of a national bank must be held to be not only statutory but contractual as well. The action brought by the plaintiff in error, therefore, comes within the limitations of sub-division 3 of Sec. 4800 Ballinger's Ann. Codes and S. D. Wash."

In the case of Concord First National Bank *vs.* Hawkins, 174 U. S. 364, the Receiver of a National Bank brought suit to recover an assessment levied upon stock owned by another national bank. The stock was held by the defendant bank as an investment of part of its surplus funds. In discussing the nature of the liability of defendant, whether it were statutory or contractual, this court said, "In the present case it is sought to escape the force of these decisions by the contention that the liability of a stockholder in a national bank to respond to an assessment in the case of insolvency is not contractual, but statutory. Undoubtedly, the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But as the ownership of the stock, in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation."

Since the decision of this question by the U. S. Circuit Court of Appeals, this court has decided the case of McDonald *vs.* Thompson, 184 U. S., p. 71, where it was contended by the Receiver of a National bank that a provision of the Statute of Limitations relating to contracts in writing was applicable to the action brought to recover an assessment upon a shareholder levied by the Comptroller of the Currency. This court held that the action was not brought upon a contract in writing, but upon an implied contract not in writing or upon a liability created by statute. The statute which was found applicable to the action was as follows:

> "Sec. 11. Within four years, an action upon a contract not in writing, express or implied, an action upon a liability created by statute other than a forfeiture or penalty."

In the case now before the court the statute undertakes in a single provision to cover actions upon contracts and liabilities, both contractual and statutory. The language is as broad as it can be made. The "liability" referred to is not limited except by the clause "which is not in writing and does not arise out of any written instrument." We respectfully submit, therefore, that the case of McDonald *vs.* Thompson is conclusive in favor of the defendant in error in this action.

If the statutes of Washington contained one provision as to contracts and another as to statutory liabilities, it would be necessary to determine which statute was applicable. In that event, we should contend that the statute relating to contracts rather than the statute relating to liabilities created solely by statute, would apply to this action.

The contractual liability of defendant is direct and the statutory liability is remote. He subscribes for stock

subject to a statute which becomes part of his contract, making him liable for the assessment when levied. By reason of his subscription it became defendant's statutory duty when an assessment was levied to pay it. In Metropolitan Railroad *vs.* District of Columbia, 132 U. S., p. 1, this court says, page 13, "The fact that the duty which the defendant failed to perform was a statutory one, does not make the action one upon the statutes. The action is clearly one of those described in the Statute of Limitations." The case of Carroll *vs.* Green, 92 U. S., 509, is strongly in point. There the action was brought against shareholders of an insolvent bank to enforce their liability for double the amount of their stock, according to the provisions of the charter. It was held by this court that the liability of the shareholders arose from their acceptance of the charter and their implied promises to fulfill its requirements and that the legal remedy to enforce it was an action on the case to which the Statute of Limitations would apply; and, hence, that it applied to a bill in equity founded on the same application.

The statute imposing a liability upon one who subscribes to stock in a corporation is substantially a part of the charter of the corporation.

Power of the Deputy Comptroller to Levy an Assessment.

Plaintiff in error contends that it is beyond the power of the Deputy and Acting Comptroller to levy an assessment.

The Act of June 3, 1864 (13 Stat., 99), provides "There shall be in the Bureau of the Comptroller of the Currency a Deputy Comptroller of the Currency, to be appointed by the Secretary, who shall be entitled to a salary of two thousand eight hundred dollars a year, and who shall possess the power and perform the duties attached by law to the office

of Comptroller during a vacancy in the office, or during the absence or inability of the Comptroller."

This officer is the one who performed the duty of making the assessment, and he so described himself. The court will presume that he was the proper officer and was acting within the terms of the statute, until the contrary is shown by proof in the proper proceeding.

Alleged Defect in Assessment.

Plaintiff in error after the second assignment claims that the complaint does not state what the total capital stock of the association was at the time the assessment was levied.

The complaint states in Paragraph 3 of the Record, p. 2, that the Comptroller "levied an assessment and made a requisition upon the shareholders of the said The First National Bank of South Bend, for Fifty Thousand ($50,000.00) Dollars," * * * and "made a demand upon each and every one of said shareholders for One Hundred ($100 00) Dollars, upon each and every share of the capital stock of said association held and owned by them respectively."

In Paragraph 5, it is alleged that "The defendant was the owner of Twenty-five (25) shares of the capital stock of said Bank, of the par value of One Hundred ($100.00) Dollars per share."

In Paragraph 8, it is alleged "That by virtue of the premises, and the statute in such case made and provided, the defendant is indebted to the plaintiff in the sum of Twenty-five Hundred ($2500.00) Dollars, and interest thereon," etc.

It is a clear deduction from these allegations that the capital stock was Fifty Thousand ($50,000.00) Dollars, and that the face value of each share was One Hundred ($100.00) Dollars. The Circuit Court of Appeals had no trouble in making this deduction, but we submit that it is

unnecessary for the complaint to state the total capital stock of the association. It is sufficient for defendant to be informed of the amount of his assessment and to be assured that no discrimination is made against him in favor of other shareholders.

The Alleged Agreement to Dismiss Suit.

In discussing this assignment, we desire first to call the court's attention to the facts as disclosed by the Record. On page 15 of the Record is the paragraph in the answer of the plaintiff in error to the complaint with reference to the alleged compromise. It is alleged therein that in consideration of the immediate dismissal of the first action brought on the assessment in the State Court, that the defendant in said action, plaintiff in error here, agreed to sell to the Receiver certain real estate in South Bend for an agreed price, part of which was to pay the debt of another party to the bank, and the remainder was to be applied as a credit on the claim sued on in this action, and that the Receiver accepted the proposition and requested the execution of the deed; that the deed was executed and delivered; that the Receiver did not dismiss the action in accordance with the agreement, but filed the papers in the case and took a judgment by default.

There is no finding of fact on the subject of this compromise by the court. (Record pp. 20–21.)

On page 41 of the Record, the letter containing the proposition and the response thereto, which constituted the evidence of the defendant in error on the proposition of compromise, speak for themselves and show that the price of the real estate was absolutely fixed, as well as terms upon which it was to be conveyed, and they were fully consummated, as appear in the answer of the plaintiff in error in this case, on page 15 of the Record. Here it is distinctly alleged that the deed was given.

It does not appear that the Comptroller of the Currency ever approved, or that any court of competent jurisdiction ever ordered, any settlement of the claim against the defendant. The Receiver, acting under the direction of the Comptroller of the Currency, had certainly no power to release the defendant from any part of his obligation, or to accept anything other than money as part payment of such obligation. He received Two Hundred ($200.00) Dollars in money from the defendant, which has been credited, and for which no judgment has been rendered. It seems that he has received also a tract of land. What disposition was made of this land does not appear. He was authorized to sell it. Whether he did sell it or not does not appear in the Record. It is shown, however, that the court offered to give plaintiff in error credit for the land, if he so desired. He had an opportunity to obtain the full value of his land at that time, but failed to avail himself of the privilege.

It will be observed that there is a contradiction between plaintiff's pleadings and his evidence on the subject of the proposed compromise. He alleges, on page 15 of the Record, that the conveyance of the land was made in consideration of the immediate dismissal of the action. On page 16 of the Record, he states that thereafter the defendant made further proposals to the Receiver to compromise and settle the balance of the assessment. The evidence shows (Record, page 14) that the proposition was made in a single letter dated April 8, 1897.

The defendant failed on May 1, 1897, to pay the $425.00; also on August 1, 1897, to pay $625.00, and on November 1, 1897, to pay a further installment of $625.00. He had, therefore, failed entirely to perform any part of his executory agreement at the time the Receiver took judgment against him in December, 1897. If there was accord there was clearly no satisfaction.

Res Judicata.

It is claimed that the action in the State court on the assessment is a bar to this action.

After the final judgment taken by default in that action was set aside on the application of the plaintiff in error (defendant in said action), the plaintiff voluntarily dismissed the case. Why this was done does not appear, but probably on account of the letter of defendant in the action, which appears on page 42 of the Record, the letter being dated April 8, 1897. Defendant in the action then moved to set aside the order because he had not been served with notice of the application for dismissal and because the entry of dismissal contained the words "without prejudice."

The Record shows that plaintiff consented that the words "without prejudice" in said dismissal might be stricken out, and they were stricken out. (Record, p. 14.)

It is claimed by plaintiff in error that the effect of this consent by plaintiff was to make the judgment *res judicata.* He argues that the plaintiff by consenting that the words "without prejudice" might be stricken from the original entry, agreed not to bring another action. We think it obvious that no such inference can be drawn from the consent of the plaintiff. The effect of the order and agreement was simply to leave the former entry as if the words "without prejudice" had not been contained therein. That was the sole object and purpose and extent of the order striking out the words.

The Receiver should not by implication or construction be held to have intended to enter into an agreement which he had no power to make.

Under the Statute of Washington, and indeed, under the law generally on the subject, it is not necessary for an order

to show that the dismissal was without prejudice, but if it shows that it was voluntary dismissal, and in fact, a voluntary non-suit by plaintiff, it is no bar to another suit on the same cause of action.

Section 409 & 411, Hill's Ann. Stats. & Code of Wash.;

Secs. 5085 to 5087, Ballinger's Code of Wash.

Under the Code procedure of the State of Washington, and which apply in the trial of this action in the United States court, a voluntary dismissal is treated as a voluntary non-suit.

The plaintiff, under Section 409, may, at any time before the jury retire to consider of their verdict, unless a set-off be interposed as a defense, or unless the defendant sets up a counter-claim to the specific property or thing which is the subject matter of the action, dismiss his case or take a non-suit.

This being a jury case, tried to the court under stipulation, and there being no off-set or counter-claim, the plaintiff had a right to a voluntary dismissal at any time before a judgment was entered on the merits.

Section 411 provides that "When a judgment of non-suit is given, the action is dismissed; but such judgment shall not have the effect to bar another action for the same cause."

Under the latter section, even if there is a trial, and the evidence of plaintiff all introduced, and the defendant should move for a non-suit and it should be granted, this would not be a bar to another action for the same cause.

Under the code system of pleading and practice, the authorities hold that in an action at law, as is the one under consideration, even after the plaintiff has put in his evidence on the trial, the dismissal of the complaint has no

more force than a non-suit at common law, and does not bar a subsequent action for the same cause.

Black on Judgment, Sec. 703.
Davenport *vs.* Turpin, 43 Cal., 597.
Wheeler *vs.* Buckman, 51 N. Y., 391.
Bond *vs.* McNider, 3 Ired., 440.
Clews *vs.* Cleghorn, 13 Ind., 438.

The Statute of Washington (Hill's Code, Sec. 406; Ballinger's Code, Sec. 5080) defines a judgment to be "The final determination of the rights of the parties in the action."

We think that the authorities cited by plaintiff in error on this point have no application, and therefore do not enter into a criticism of them. There was no answer or other pleading by the defendant in the case in the State Court, and no issue, and no trial on the merits.

A number of other objections of a technical nature are made to the judgment by plaintiff in error, all of which we think are effectually disposed of by the opinion of the United States Circuit Court of Appeals (Record, pp. 52–55). The Bill of Exceptions does not contain any statement that it contains all the evidence introduced by the parties on the trial. The Finding of Facts made by the court are sufficient to sustain the judgment rendered by the court. It appears upon the whole record, and is not seriously denied, that the First National Bank of South Bend was insolvent and in the hands of a Receiver duly appointed by the Comptroller of the Currency; that the defendant was a shareholder owning twenty-five (25) shares of stock, upon which an assessment was levied of one hundred per cent. It is impossible to find in the entire record, from the beginning to end, why the defendant should not have paid the assessment. It does not appear that any contract releasing him

from his assessment was ever made, or intended, by the Receiver. He has obtained credit for all the money he has ever paid upon his assessment, and is entitled to credit for the land whenever he is willing to accept the same.

It is submitted that upon the whole record there does not appear to have been any error committed by the court to the prejudice of the plaintiff in error.

Respectfully submitted,

F. F. OLDHAM,

Attorney for Defendant in Error.